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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-70

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 456, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 456, IN OPPOSITION

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OPINIONS BELOW

The decision of the Board finding appropriate the unit, the clarification of which is here contested, is reported in 89 NLRB 9, 35 (office, clerical and technical employees, Jersey City Works). The Board's decision directing the election which resulted in the currently outstanding certification of respondent union as the representative of that unit is reported in 116

NLRB 1545. The Regional Director's Decision and Order Clarifying Bargaining Unit (42a)[1] is not officially reported. The Board's Decision on the Review (38a) of the Regional Director's Clarification is reported in 173 NLRB No. 43, 69 LRRM 1332, 1968—2 CCH NLRB Par. 20268. The Board's decision (25a) finding that petitioner Westinghouse unlawfully refused to bargain with respondent union as representative of the clarified unit is reported in 177 NLRB No. 49, 71 LRRM 1496, 1969 CCH NLRB Par. 21039, and its Supplemental Decision and Order (22a) is reported at 182 NLRB No. 85, 74 LRRM 1204, 1970 CCH NLRB Par. 21897. The opinion of the court of appeals (10a) enforcing the Board's order is reported in 440 F.2d 7.

QUESTIONS PRESENTED

After the Board, in unquestionably valid proceedings, found a unit of "office, clerical and technical" employees appropriate and certified a union as their representative, a new classification was created. The union claimed that the employees in the new classification were technical and hence included in the unit but the employer insisted that employees in the new classification were professional, rather than technical, and refused to accept them as part of the unit. The questions are:

1. Whether the Board, on application of the union for unit clarification, properly clarified the unit with-

[1] Numbers in parenthesis followed by "a" refer to the pages of the Appendix to the Petition for a Writ of Certiorari. Numbers in parenthesis preceded by "A" refer to pages of the Joint Appendix filed in the Court of Appeals. References to Westinghouse's Exhibits are prefixed by "Emp. Exh." and references to IUE exhibits are prefixed "Un. Exh."

out conducting a new election where the Board found that no question of representation existed and that the employees in the new classification are technical employees included in the original unit.

2. Whether there is substantial evidence to support the finding of the Board that the systems and procedures analysts here involved are technical rather than professional employees.

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes and regulations set forth in the petition (pp. 1a-9a), Sections 102.60(b) and 102.61(d) of the Board's Rules and Regulations (29 CFR 102) are pertinent here, and are printed in the Appendix to this brief, pp. 22-23, *infra*.

STATEMENT OF THE CASE

The employees at the Jersey City Works of Westinghouse were from 1945 to 1950 represented by the United Electrical, Radio and Electrical Workers of America (UE) and from 1950 to date by the International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE). At the time the IUE was formed in 1950 the Board held hearings, found appropriate two units at the Jersey City Works and directed elections which IUE won and as a result was certified in both units. The larger of these units, the production and maintenance unit, is not involved in this case. The smaller of the two units, the one involved in this case and for which IUE Local 456, one of the respondents here, was certified, was defined by the Board as composed of "all office, clerical and technical employees," with exclusions not here rele-

vant. *Westinghouse Electric Corp.*, 89 NLRB 9, 35 (1950).

In 1956, as a result of a petition for representation filed by still a third union, seeking to represent the unit composed of "office, clerical and technical" employees at the Jersey City Works, the Board reiterated its finding that these employees constituted an appropriate unit. In the ensuing election, IUE Local 456 again won and was certified. *Westinghouse Electric Corp.*, 116 NLRB 1545, 1546-1548 (1956).

Throughout the years since 1945 Westinghouse has entered into successive collective bargaining contracts, first with UE and thereafter with IUE, applicable to the unit of "office, clerical and technical employees" at the Jersey City Works (A 6-7, 15-16; Emp. Exh. 1, A141; Emp. Exh. 2, A144; Emp. Exh. 5, A152; Emp. Exh. 7, A156; Emp. Exh. 7B, A158, Emp. Exh. 7C A160). At times here relevant the number of employees in this unit has varied from 280 (A190) to 315 (A14).

In August 1965 Westinghouse created a new classification of Systems and Procedures Analysts A and B (Emp. Exhs. 3 and 4, A146-151). IUE contended that the seven employees holding these jobs were technical employees and hence within the unit. Westinghouse took the position that they were professional employees and hence entitled to a self-determination election for the purpose of deciding for themselves whether they should be grouped in the same unit with non-professional employees or in a separate unit.

To resolve this controversy IUE Local 456 filed a petition with the NLRB alleging that no question of

representation existed [2] and requesting that the Board clarify the unit by finding that the seven Systems and Procedures Analysts A and B were technical employees and therefore included in the existing unit (A3-5).

In the hearing conducted by the Board, Westinghouse contended that the Systems and Procedures Analysts A and B were excluded from the unit because the present Analyst positions are an outgrowth of the staff assistant positions which had been found to be professional and excluded from the unit in the Board's unit finding in 1956. 116 NLRB at 1548. The Regional Director's findings on this issue (47a-48a) affirmed by the Board (39a-40a) and the court, were described by the court as follows (14a-15a):

> "[A]lthough the Analysts do exercise some independence of judgment, their function is much narrower than that of professional employees such as the staff assistant and their range of discretion is not so broad. It was the staff assistant who considered all of the alternative systems for performing the clerical work and made the affirmative recommendation to adopt the mechanization process. The Analyst merely applies that process to particular assigned projects and formulates

[2] The assertion on page 2 of the petition that "IUE, by filing a petition 'to clarify' the unit instead of a charge alleging a refusal by Westinghouse to bargain concerning the Analysts, tacitly admitted" that a "question of representation" existed is inaccurate. No such admission is implied in filing a petition for clarification for the Board's rules expressly make the absence of a question concerning representation a prerequisite to the filing of a petition for clarification of a unit. Rule 102.60(b) printed p. 22, *infra*. Throughout every step of the litigation the union contended that no question concerning representation existed and was successful in so convincing the Regional Director, the Board and the court below (16a, fn. 2).

systems and procedures in order to solve efficiency problems which are posed to him by others. His concern is with the methods of mechanization rather than the desirability of the process and although his position would never have come into being without the recommendation of the staff assistant, his responsibilities are much more clearly defined than those of the staff assistant.

"Furthermore, it is apparent that in Westinghouse's operations, the Systems and Procedures Analysts do not need the kind of knowledge of an advanced type that is normally acquired as a result of prolonged study in an institution of higher learning. Thus, despite the fact that the company's 1965 job descriptions for Analyst positions listed a college degree as a prerequisite, only two out of the seven Analysts have college degrees. * * *

"Four of the seven employees now serving as Systems and Procedures Analysts were promoted to the Analyst positions directly from jobs in the existing bargaining unit. While an employee can change his work status as a result of additional training and experience, there would seem to be no basis for finding that these four formerly technical employees had become professionals overnight merely by moving into jobs outside of the existing unit of non-professional employees."

Westinghouse also argued that this was not proper case in which to clarify the unit because the jobs of the Systems and Procedures Analysts A and B had come into existence prior to the negotiation of the current collective bargaining agreement, the union made no effort during negotiations to cover these employees and the Board has an established principle of refusing to clarify units to include employees to whom the union failed to make a prompt unit claim. With respect to this contention the Regional Director

(51a-54a), the Board (40a-41a) and the court (18a-19a) agreed that the union had not slept on its rights because it made prompt demands of Westinghouse for pertinent information which Westinghouse delayed furnishing. After the hearing the Board's Regional Director issued a Decision and Order Clarifying Bargaining unit in which he granted the requested clarification. His concluding findings are as follows (54a-55a):

> "I find that such employees are technical employees who fall within the scope of the existing certified unit. Also, * * * by reason of their technical functions and conditions of employment, these employees have a close community of interest with the other technical employees of the Employer, all of whom are in the existing unit of office, clerical and technical employees, and had their classification been in existence at the time of the original proceeding and certification, it is clear that they would have been included as part of the said unit. Since it appears that they came into existence after the certified unit was established, and under the circumstances above discussed, I find, upon all the facts in this case, that they constitute an accretion to the existing unit." (Footnotes omitted)

On request of Westinghouse for review of the Regional Director's decision and order (A205), the Board denied review of the attack on the finding that the disputed classifications were technical rather than professional (38a, fn. 2), but granted review with respect to the use of the clarification procedure in the circumstances of this case (38a). In its Decision on Review the Board determined that the clarification procedure had been properly used to clarify the inclusion in the unit of Systems and Procedures Analysts A and B,

since the jobs of these employees were merely a more modern version of the same jobs as were originally in the unit. The Board stated (40a):

> "It is evident from the foregoing that the Employer's present computerized procedures are but a substitute, albeit more sophisticated complex, for the work originally performed by the Employer's clerical unit employees."

At no time did any of the seven Systems and Procedures Analysts A and B ever indicate any opposition to being included in the unit and represented by IUE Local 456. A couple of the Systems and Procedures Analysts A and B were present during the hearing on the clarification petition and one of them, Cassella, the only Analyst A, testified as to the nature of the work performed by these Analysts (A51-55). There is not the slightest basis in the record for the statement in the petition for certiorari, p. 1, that the "Board dragooned those employees into the IUE's unit" and (p. 22) that the Board is forcing employees "apparently against their will" to accept representation by IUE.

Westinghouse refused to abide by the clarification of unit, with the result that the IUE filed refusal to bargain charges which resulted in the Board order to bargain (25a-35a) which was affirmed by Supplemental Decision and Order of the NLRB (22a-24a) and enforced by the court of appeals (11a-21a).

In the court below Westinghouse contested the finding that the Systems and Procedures Analysts A and B were technical rather than professional and the use of the clarification of unit procedure to determine that these employees were within the unit. In both respects the court of appeals sustained the Board (13a-19a).

ARGUMENT

I

THE UNIT CLARIFICATION PROCEDURE FOLLOWED IN THIS CASE PRESENTS NO QUESTION DESERVING REVIEW BY THIS COURT

The instant facts present the classical case for use of the clarification of unit procedure. The Board, the courts and commentators are uniformly agreed that the problems raised by the impact on the composition of the bargaining unit by the day-to-day changes in manufacturing processes which continually result in new job titles, new classifications and new jobs, should be expeditiously resolved by the Board's unit clarification procedures. This procedure allows either the employer or the representative of a unit to apply to the Board as soon as any question arises as to whether an employee is within an existing unit and get a ruling without waiting for the existing collective bargaining agreement to expire and even though everyone concedes that the representative is the majority choice of the employees in the unit whether or not the disputed employees constitute part of the eligible electorate.

This court in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268-269 (1964) recognized that the unit clarification procedure is a proper exercise by the Board of its powers under the Act. The several courts of appeals have all agreed. *T. O. Metcalf Co.* v. *NLRB*, 405 F.2d 1022 (1st Cir., 1969); *NLRB* v. *Clarostat Manufacturing Co.*, 216 F.2d 525, 528 (1st Cir., 1954); *Smith Steelworkers* v. *A. O. Smith Corp.*, 420 F.2d 1, 6-7, 9 (7th Cir., 1969); *McCulloch* v. *Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir., 1968), *cert. den.*, 393 U.S. 1016; *Valentino* v. *McCulloch*, 67

LRRM 2812, 2813 (U.S.D.C.W.D.N.Y., 1966). The district court in the *Valentino* case, in holding that the Board could properly clarify the unit on the petition of an employer who constructed two new facilities and transferred employees in the unit to the new facility, stated (67 LRRM at 2812-2813):

> "Once bargaining units have been defined, it is apparent that changes may occur in a company's operations, its plant, etc, which may have little or no bearing upon the integrity of the units but require that the units be redefined."

The Company itself in *Westinghouse Electric Corp.*, 162 NLRB 768, 769 (1967) initiated clarification proceedings.

Two recent law review articles devoted to an analysis of the Board's clarification procedure, give unstinting approval to the use of this procedure under circumstances such as are present there. Eugene G. Goslee, Clarification of Bargaining Units and Amendments to Certification, 1968 Wis. L. Rev. 988, 989, 1003-1004, states:

> "Constant technological change and growth of economic production are predominant features of our industrial society. As a result bargaining units, like other facets of industrial life, can seldom be formulated so that their appropriateness continues unabated for long periods of time. As concepts of production change, and as both industry and organized labor grow by expansion and merger, the Board's amendment and clarification procedures can provide an expeditious means to rectify inherent or developed problems in the coverage of collective bargaining units.
>
> * * * *

> "* * * Given the fact that the complexities of our industrial society are ever increasing and given the fact that many bargaining units were formulated during the early years of the National Labor Relations Act, the amendment and clarification procedures will become increasingly more important in years to come."

John E. Abodeely, The NLRB and the Unit Clarification Petition, 117 Univ. of Pa. L. Rev. 1075, 1102 (June, 1969) similarly states:

> "The unit clarification petition was developed as an instrument of flexibility which was demanded by the dynamics of the employment relationship and the goals of the NLRA. Where there is a disputed job classification or an allegation of an accretion the clarification procedure provides an expedient and valuable means of resolution."

The repeated contention in the petition (pp. 2, 4, 7, 21, 22) that the Systems and Procedures Analysts A and B should not have been added to the unit without an election, would extend the provisions of Section 9(b)(1) to other than professional employees. Section 9(b)(1) requires that professional employees be allowed to vote as to whether they desire to be included in the same unit with non-professional employees or in a separate unit composed only of professionals. The statute makes the requirement of a self-determination election for unit placement applicable only to professional employees. Once the Board found that the Analysts were not professional employees the Board was no longer under any statutory duty to permit the Analysts to make their own selection as to unit placement.

An issue as to unit placement differs from a question concerning representation, as the Board has uni-

formly recognized by its rules and regulations making the petition for clarification of unit dependent on the absence of a question of representation (Rule 102.60(b) printed p. 22, *infra*) and the Board's uniform holdings that clarification of unit procedure is unavailable when a question concerning representation exists. *Crucible Steel Casting Co.*, 162 NLRB 1513 (1967); *General Electric Co.*, 160 NLRB 604 (1966); *Beaunit Fabrics, Inc.*, 153 NLRB 987 (1965); *Sterilon Corp.*, 147 NLRB 219 (1964).

In the instant case Westinghouse has continuously, since the certification in 1956, recognized IUE as the representative of the unit of office, clerical and technical employees at its Jersey City Works. No one has suggested that the inclusion of the seven Analysts in this unit of 280 (A190) to 315 employees (A14) would affect the IUE's majority status. Whether the seven were in or out of the unit, the IUE was still the majority selection.

Moreover, majority status is not something as to which periodic thermometer readings are taken. It is now horn book law that for the term of any collective bargaining agreement, running three years or less, no test of majority can be made except during the period 90 to 60 days before the expiration date of the agreement. During the contract term employees come and go in and out of the unit by various methods, new hires, transfers to and from non-unit jobs, creation of new jobs which both the employer and the union agree are properly in the unit. At no time, whether or not it is the period for testing majority, is it material whether the new entrants into the unit desire the union. A question of representation never

exists based on their choices or non-choices. *Borg Warner,* 113 NLRB 152, 154 (1955), affirmed *sub nom. UAW* v. *NLRB,* 231 F.2d 237, 243 (7th Cir. 1956), *cert. den.* 352 U.S. 908. A question of representation only exists if their inclusion or exclusion makes the choice of a majority of all those in the unit dubious.

The Board, over the years, has uniformly refused to entertain petitions for clarification to add an employee or employees who existed in the same positions prior to an election (*Gould National Batteries, Inc.,* 157 NLRB 679 (1969); *Douglas Aircraft Co.,* 147 NLRB 920, 922-924 (1964) or prior to a contract negotiation during which the union made no proposal to cover the employee or employees by the contract. *Mountain States Tel. Co.,* 175 NLRB No. 91, 71 LRRM 1022 (1969). To allow use of clarification of unit procedures in such instances would open the door to gerrymandering of units to assure a majority vote for the union, while leaving the union thereafter free to blanket into the unit those whom it did not trust to vote for it. In contract negotiations, similarly, if the union raised the claim before the contract was settled the employer would be in a position to question the majority status of the union for the expanded unit, should it doubt that the union represented a majority of the unit when so enlarged. Once the contract is signed, it would be unfair to bring in a group which might throw doubt on the union's majority when the union deliberately kept quiet about its desire to represent those people during the period in which the employer could have raised an issue of representation which would have resulted in an election in the whole unit if the union persisted in its claim.

In the instant case no issue of the union's status as the choice of the whole unit, even with the seven added, arises. The circumstances of the IUE's efforts to learn about the Analysts as soon as the classification came into existence established, as the Regional Director (51a-54a), the Board (40a-41a) and the court of appeals (18a-19a) held, that the IUE had properly pursued inclusion of the Analysts in the unit. The contentions which Westinghouse makes with respect to the diligence of the IUE present no question of law for decision by this Court.

II

THE SUBSTANTIALITY OF THE EVIDENCE TO SUPPORT THE FINDINGS, CONCURRED IN BY REGIONAL DIRECTOR, BOARD AND COURT, THAT THE ANALYSTS ARE TECHNICAL RATHER THAN PROFESSIONAL EMPLOYEES, PRESENTS NO ISSUE WARRANTING REVIEW BY THIS COURT

The question of the character of the Systems and Procedures Analysts A and B as presented in this case is solely an issue of substantial evidence. No question as to interpretation of Section 2(12) defining professional employee is presented. Rather only the evaluation of the evidence as bringing this case within well established interpretation was required. And the evidence was sufficiently clear that the Regional Director (47a-48a), the Board (37a-40a) and the court of appeals (14a-15a) were in complete agreement that the Analysts were not professional employees.

Section 2(12) defines professional employees to mean

> "(a) employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent ex-

ercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or

"(b) any employee who (i) has completed the course of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

Essentially, the Systems and Procedures Analysts A and B are data programmers. They are assigned projects where it is felt that procedures might be improved in various departments. The Analyst consults with the heads of the departments involved to determine the nature of the problem and the desired solution. The Analyst then, using his independent studies and judgment, recommends routines, methods or systems for achieving this purpose. He prepares a program or series of programs and draws programs in the nature of flow charts showing the necessary steps which should be taken to arrive at the final product. The Analyst writes the procedure for the computer machine operators and writes instructions for the employees in the affected departments. In selecting the method the Analyst confers with his supervisor and the heads of the departments involved, all

of whom might pass judgment on the acceptability of his work. (A51-55).

Of the seven Analysts, four were computer machine operators, concededly a bargaining unit job, prior to being transferred to the Analysts classification. Knowledge of computers, their operation and potential, is an important qualification for their work (A73-74); Emp. Exhs. 16A, C.E.G. A180, 183, 185, 188).

With respect to compensation, working conditions, fringe benefits and other terms and conditions of employment, those of the Systems and Procedures Analysts are similar to the technical employee in the bargaining unit who were salaried (A57-58, 61, 65-68, 70, 121, 122).

The nature of the work which the Systems and Procedures Analysts A and B performed was also similar to the work which the Board has consistently found to be technical rather than professional. *Safeway Stores, Inc.,* 174 NLRB No. 189, 70 LRRM 1438 (1969); *Armstrong Rubber Co.,* 144 NLRB 1115 (1963); *Radio Corporation of America,* 141 NLRB 1134 (1963); *R. L. Polk,* 123 NLRB 1171 (1959). The Board's language in the *Safeway* case, *supra,* is particularly relevant to the case at bar, with respect to the duties of the employees in the disputed classifications (70 LRRM at 1441):

> "The programmers, as noted above, prepare programs for electronic computers (IBM 360-30 and 360-20) and related data processing equipment. In so doing, *the programmers develop and write up machine methods for solving problems, doing clerical work, and providing required accounting and operating information. They control programs from problem statements to production*

> *run. They report directly to the data processing manager. But because of technical know-how, they are left entirely on their own. Nobody else can program the equipment, except the programmers.* The position description requires a college degree or equivalent experience and one to three years experience in programming or related work * * * *We find that a prolonged course of specialized intellectual instruction and study is not required of these programmers, so as to qualify them as professional employees under the Act* * * * [Emphasis supplied].

The uncontroverted testimony (A51-55) of one of the Systems and Procedures Analysts—the only testimony in the record by an employee in the disputed classifications—clearly shows the parallel between the work performed by the programmers in *Safeway* and the work in the case at bar.

The actual educational requirements of the Systems and Procedures Analysts A and B do not satisfy the educational criterion for professional employee set forth in Section 2(12) of the NLRA. Thus, the 1965 job descriptions (Emp. Exhs. 3 and 4, A146-151) speak of degrees from "an accredited college or university or its equivalent," but the testimony of the Systems and Procedures Analyst who testified at the hearing shows that he did not have a college degree (A120, 131), that he went to IBM schools in "the same manner as the bargaining unit machine operators" (A120-121), and that only *after* he became a Systems and Procedures Analyst did he take an IBM course on the 360 computer (A127). Another Systems and Procedures Analyst, without any college degree, was transferred to the disputed classifications *after* the 1965 job descriptions became effective (Emp. Exh.

160, A183). Furthermore, only two of the seven Analysts involved have college degrees (A73-76; Emp. Exhs. 13 and 14, A169-174).[8]

On these facts, no issue for review by this Court inheres in the ruling that Analysts were not professional employees within the meaning of Section 2(12) of the Act.

III

THERE IS NO INCONSISTENCY BETWEEN THE BOARD'S DECISION IN THIS CASE AND ANY PRIOR DECISION OF THE BOARD

Inconsistency of the Board is hardly a ground for review here. However, since the petition (p. 19) asserts that the inconsistency amounts to arbitrary and capricious conduct, we shall show that none of the cases cited by petitioner is inconsistent with the instant decision.

The citation (Pet. pp. 16-17) of *Worthington Corp.*, 155 NLRB 222 (1965) reveals a profound misreading by the Company not only of the Board's holding but of the facts of that case. The Board had found that the initial certification in *Worthington* was for an office, clerical and technical unit, but that, by reason of a subsequent decertification proceeding, the union therein was decertified for all technical employees. *Id.* at 223. Consequently, the Board held that the electronic data and planning processors, having a

[8] Westinghouse argues that two of the Analysts had previously been classed as professional in their former classification of time study clerk (Pet. p. 25), but clearly this does not make them professional when transferred to the disputed classifications since, as Westinghouse agrees, it is the nature of the disputed work which governs whether an employee will be classed as professional or not.

separate community of interest from office clerical employees, could not be accreted to the existing clerical unit (155 NLRB at 227).

Similarly, *Bethlehem Steel Corp.*, 172 NLRB No. 32, 68 LRRM 1391 (1968) (cited Pet. p. 17) is a case where the union petitioned for programmers to be accreted to any existing *clerical* unit, and where the employer contended that such programmers were technical employees who did not have a community of interest with the employees in the existing clerical unit.

In *Gould National Batteries, Inc.*, 157 NLRB 679 (1969) (cited Pet. p. 17) the union was certified specially for only one of the Company's administrative divisions (Inicad division), and at a later date attempted to include employees in two other administrative divisions in the existing unit. The Board, in these circumstances held that the unit had been specifically certified for one administrative division and could not be expanded by way of clarification procedure to include other administrative divisions.

In *Industrial Siderurgica*, 147 NLRB 975 (1964) (cited Pet. p. 17), the union attempted to include by means of the clarification procedure employees of a functionally distinct and independent company into the certified unit of another company's employees.

In *Douglas Aircraft Co.*, 147 NLRB 920, 922-924 (1964) (cited Pet. p. 18), the union by a consent election agreement, *expressly specified* that tool designers A would remain excluded from the unit. Thereafter it sought to include such specifically excluded employees in the certified unit by means of the clarification procedure.

In *Beaunit Fibers, Inc.*, 153 NLRB 987 (1965) (cited Pet. pp. 15-21), the Board refused to include four salaried employees in a unit of hourly-paid non-supervisory employees where the salaried employees' functions existed prior to certification, and where the union in the past had specifically demanded that the work be performed by hourly employees, rather than seeking to represent salaried employees.

In *Sterilon Corp.*, 147 NLRB 219 (1964) (cited Pet. pp. 15-20), the company omits critical language from the Board's opinion (Pet. p. 21), namely, that prior to its motion to clarify the unit, the union involved specifically demanded that unit employees transferring to shipping and receiving (the classifications the union now wanted included in the certified unit) be removed from the unit seniority list. *Id.* at 221. Thus, in *Sterilon*, prior to clarification the union expressly indicated its position that it considered the employees in shipping and receiving outside the certified unit.

In *Mountain States Tel. Co.*, 175 NLRB No. 91, 71 LRRM 1022 (1969) (cited Pet. p. 21), prior to clarification, the union had steadfastly maintained (and had in fact obtained during negotiations a clause in the collective bargaining agreement) that the analytical clerks it now sought to include in a unit of journeymen and apprentice electrical workers were outside the union's jurisdiction.

Westinghouse in its request for review specifically characterized the classification of Programmer—admittedly created after the recertification—as a "newly-created position" (Company's Pet. for Review, A208). The forerunner of the disputed classifications came into existence in 1961 or 1962 when

Westinghouse first acquired its IBM computer equipment and established classifications—Data Processing Methods and Systems Analysts (Emp. Exhs. 14 and 15, A 172-178)—based on the use of such equipment. Moreover, the duties and the designation of the job classifications of Systems and Procedures Analysts A and B were not arrived at until 1965 (Emp. Exhs. 3 and 4, A 146-151). These facts destroy Westinghouse's attempt to establish that the existence of the disputed classifications antedated the recertification in 1956. Thus, the Board's finding that the disputed classifications were established subsequent to recertification, deriving from the use of new computer data processing techniques and not reaching a job content approaching their present form until 1961, is not a departure from the Board decisions cited in the Petition (p. 15) but is completely consistent with those cases.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent Union

Dated August 11, 1971

APPENDIX

Section 102.60(b) of the Board's Rules and Regulations, 29 CFR Sec. 102.60(b) provides:

> "(b) *Petition for clarification of bargaining unit or petition for amendment of certification under Section 9(b) of the act; who may file; where to file; withdrawal.*—A petition, for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in subsection (a) of this section shall be followed."

Section 102.61(d) of the Board's Rules and Regulations, 29 CFR Sec. 102.61(d) provides:

> "(d) A petition for clarification shall contain the following:
>
> (1) The name of the employer and the name of the recognized or certified bargaining representative.
>
> (2) The address of the establishment involved.
>
> (3) The general nature of the employer's business.
>
> (4) The description of the present bargaining unit and, if the bargaining unit is certified, an identification of the existing certification.
>
> (5) A description of the proposed clarification.
>
> (6) The names and addresses of any other persons or labor organization who claim to represent any employees affected by the proposed clarification and brief descriptions of the contracts, if any, covering any such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of the unit.

(10) The name, the affiliation, if any, and the address of the petitioner.

(11) Any other relevant facts."

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-70

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a–21a) is reported at 440 F. 2d 7. The Board's supplemental decision and order (Pet. App. 22a–24a) are reported at 182 NLRB No. 85. Its earlier decision and order (Pet. App. 25a–37a) are reported at 177 NLRB No. 49, and its decision in the related representation proceeding (Pet. App. 38a–41a) is reported at 173 NLRB 319.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1971, and a petition for rehearing was denied on June 9, 1971 (Pet. App. 58a–60a). The petition for a writ of certiorari was filed on July 13,

1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board abused its discretion to determine appropriate collective bargaining units by concluding that the Systems and Procedures Analysts at the Company's Jersey City, New Jersey, plant were technical employees and constituted an accretion to the existing unit of office, clerical and technical employees for which the Union had been certified in 1950 and again in 1956.

2. Whether the unit clarification procedure followed by the Board was proper in the circumstances of this case.

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Series 8, as amended, are set forth at pages 1a–9a of the Appendix to the petition. Also relevant are additional provisions of the Act and the Board's procedures set forth in the Appendix hereto, *infra*, pp. 17–20.

STATEMENT

A. THE 1950 AND 1956 CERTIFICATION PROCEEDINGS

The Union[1] was first certified as the exclusive bargaining representative of the Company's office, cleri-

[1] International Union of Electrical, Radio and Machine Workers, Local 456, AFL–CIO, the intervenor in the court below.

cal and technical employees in an appropriate unit in 1950,[2] and was recertified in 1956.[3] Since October 1, 1950, the Union and the Company have entered into a series of collective bargaining agreements covering this unit (A. 192; 152–153),[4] which at the time the events herein occurred, was defined as follows (A. 248; 143, 145):

> All office, clerical and technical employees of Westinghouse Electric Corp., Jersey City Works, 150 Pacific Avenue, Jersey City, New Jersey, including assistant buyers, but excluding all staff assistants to department managers or the general manager, buyers, confidential salary payroll clerks, paymasters, industrial relations employees; secretaries to Company officers, managers and assistant managers, purchasing agents, superintendents, and factory accountants; the internal auditor, budget accountants, the audit clerk, and other professional employees, guards and supervisors as defined in Section 2 (11) of the Act, as amended.

This unit totalled approximately 280 employees (A. 190).

B. THE UNIT CLARIFICATION PROCEEDING

1. THE ANALYST POSITIONS

On August 8, 1967, the Union, pursuant to Section 9(b) of the Act (Pet. App. 2a), and Section 102.60(b) of the Board's Rules and Regulations and Section 101.17 of the Board's Statements of Procedure (*infra,*

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[2] *Westinghouse Electric Corporation*, 89 NLRB 8.

[3] *Westinghouse Electric Corporation*, 116 NLRB 1545.

[4] "A." references are to the appendix, and "S.A." references are to the supplemental appendix, filed in the court below.

pp. 18, 19–20), filed a unit clarification petition with the Board seeking to include in the unit the Company's employees classified as Systems and Procedures Analysts ("A" and "B") who were not represented by a bargaining agent (A. 3–5). The Board conducted a hearing, in which the following facts were developed:

In November 1956, subsequent to the last certification of the bargaining unit, a staff assistant [5] was hired to study the possibility of converting clerical procedures to an IBM machines system (A. 194, 248; 143, 145). On the staff assistant's recommendation the Company obtained its initial equipment, including key punches, verifiers, a sorter, a reproducer, a collator, an accounting machine and an electronic calculator (A. 194, 32). These mechanized procedures were first applied to the area of inventory control (A. 194; 32–36). In December 1957, the Company issued its first job description in this area, designating the same staff assistant as programmer (A. 194; 164, 29–33). In August 1959, this former staff assistant was reclassified as "Programmer 'A'" while another person was hired and classified as "Programmer 'B'" (A. 194; 38–39).

As the extent of mechanization increased and expanded into other areas, the amount of equipment increased and grew more complex. Early in 1961, the Company obtained its first computer equipment at this location and in July a position description was promulgated for the first time on "Data Processing Meth-

[5] Staff assistants are excluded from the bargaining unit (A. 194; 143).

ods and Systems Analysts 'A' and 'B' " (A. 195; 172–178, 43–45). The Company revised the position descriptions in August 1965, creating the titles "Systems and Procedures Analysts 'A' and 'B' " (A. 146–151). There are now seven Systems and Procedures Analysts employed by the Company at Jersey City (A. 193; 179–189), all of whom work within the Computer Systems Development Department (A. 192; 172–178, 50–63).

Systems and Procedures Analysts are assigned projects in various departments. After consulting with the heads of departments to determine the nature of the problem and the desired solution, the Analyst recommends methods for achieving that solution; he then writes a program or series of programs and draws diagrams showing necessary steps which should be taken to arrive at the desired result. In preparing his work, the Analyst programs the material to be put in the computer, writes the procedure to be followed by the computer machine operator, runs a test of the procedure and writes the instructions for employees in the affected departments. (A. 193; 172–173.)

In selecting the method, the Analyst confers with his supervisor and with the heads of the departments involved, all of whom evaluate his work. If the system is a procedure of relatively small magnitude, the Analyst may have direct contact with the relevant supervisor. When the program and procedures are formulated, they are forwarded to the Data Processing Department, where the computer machine operators make the necessary changes in the machines and run

the new system on a regular basis (A. 193–194; 172–173, 185–187).

While the most recent job description established by the Company for Systems and Procedures Analysts "A" and "B" requires a college degree in business administration or business management from an accredited college or university, only two of the seven Analysts have such degrees (A. 194; 148, 151, 179–189). Four of the seven Analysts were previously computer machine operators and a knowledge of computers, their operation and potential, is an important qualification for their work (*ibid.*). Although Richard Centro, who had been a machine operator in the bargaining unit, was promoted to Analyst "B" subsequent to the issuance of the job description for this position in 1965, he did not possess the educational prerequisite (A. 194; 183).

The salary range for Systems and Procedures Analysts is from $571 to $952 monthly. The salary range for bargaining unit employees in the highest labor grade is from $151.45 to $192.90 per week, or approximately $651.24 to $829.47 per month. The highest paid Analysts "B" earned $825 monthly at the time of the hearing; the single Analyst "A" earned a monthly wage of $952 (A. 195; 60–61, 101–102, 179–189). Analysts "A" and "B" do not punch a timeclock; however, they work the same hours as the Company's first shift, from 8:30 a.m. to 5 p.m., with a 40-hour week. They receive extra compensation for overtime work. (A. 58–59, 69–70, 121–122.) The Analysts have the same

vacation time, hospitalization, holidays and wage continuation policy (paid sick leave) as salaried employees within the unit (A. 195–196; 65–71, 179–189).

2. THE UNION'S 1965 REQUEST FOR INFORMATION AS TO THE ANALYSTS' UNIT STATUS; THE COMPANY'S RESPONSE

On June 4, 1965, the Union requested from the Company "specific information concerning the duties and responsibilities" of a number of named Company employees, in order for the Union "to ascertain the reasons [for their placement] in an exempt status; that is, outside the scope of [the existing] bargaining unit" (A. 195; 19–20, 135–136). Information was sought concerning, among others, six named employees formerly described and classified as "Programmers" and then classified as "Analysts." On July 13, 1965, the Union complained that it had not yet received a reply to its June 4 inquiry and requested that the information be supplied "as expeditiously as possible." The Company replied by letter of December 2, 1965, in which it listed the names of the employees involved, classifying them as Systems and Procedures Analysts "A" or "B", and then asserted that the "[s]pecific language of certification excludes 'professional employees.'" (A. 195–196; 137–139.)

3. THE BOARD'S UNIT CLARIFICATION DECISION

On October 18, 1967, the Acting Regional Director issued his Decision and Order Clarifying Bargaining Unit in which he concluded that the Analysts were technical employees whose community of interest was with the technical employees in the bargaining unit,

and granted the Union's unit clarification petition, thus adding the Analysts, by accretion, to the existing unit. The Acting Regional Director rejected the Company's claim that the Analysts were professional employees under the Act and therefore excluded from the bargaining unit. (Pet. App. 2a.) He concluded that, because it was "clear from the record that the Systems and Procedures Analysts do not require that knowledge of an advanced type normally acquired through prolonged study in an institution of higher learning," they were not "professional employees" under Section 2(12) of the Act (Pet. App. 1a, 49a–50a). He further found that the Analysts' position came into existence after the 1956 recertification of the Union; accordingly, he rejected the Company's claim that the Analysts could be added to the unit only through a representation election and the claim that the Union had waived use of a unit clarification procedure by ignoring the Analysts during contract negotiations (Pet. App. 53a–54a).

The Company filed a request for Board review of the Director's decision (A. 205–223); the Board denied this request except with respect to the issue whether the Analysts were an accretion to the existing unit who could properly be added thereto in a unit clarification proceeding. Affirming the Director, the Board held that the Analyst positions came into existence subsequent to the 1956 recertification of the Union and were not merely an outgrowth of or substitute for the "staff assistant" excluded from the certified unit. The Board noted that the latter had de-

veloped the computerized procedures and Analysts' position as a substitute for work performed in the unit and had then become the first occupant of the new position. (Pet. App. 39a–40a.) In rejecting the Company's waiver contention, the Board noted the Company's untimely response to the Union's 1965 request for information regarding the unit status of the Analysts; the fact that the information finally given the Union was conclusory and without any facts which would have enabled the Union to assess the validity of the Company's assertion that the Analysts were professional employees and excluded from the unit on that ground; and the fact that four of the seven employees classified as Analysts had formerly occupied unit positions before moving into that classification (Pet. App. 40a–41a). In these circumstances, the Board concluded, the Union's "failure to claim these classifications at an earlier date was not fatal to its right now to invoke the Board's unit clarification procedure" (Pet. App. 41a).

C. THE UNFAIR LABOR PRACTICE PROCEEDINGS

The Union thereafter requested recognition and bargaining in the expanded unit. Upon the Company's refusal, a charge was filed and a complaint was issued alleging that the Company had refused to bargain in violation of the Act. (A. 235, 229, 232.) The Company asserted its claims made in the unit clarification proceedings and the Board held that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union regarding the

Analysts (Pet. App. 22a–24a, 25a–35a). The Board's order directed the Company to cease and desist from the unfair labor practices found; to bargain with the Union, upon its request, as the exclusive representative of the employees in the appropriate unit, including the Analysts; and to post appropriate notices (Pet. App. 24a, 33a–37a). The court of appeals affirmed the Board's findings and conclusions and enforced the Board's order (Pet. App. 10a–21a).

ARGUMENT

Section 9(b) of the Act empowers the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." The determination whether a group of employees represents an "accretion" to an existing unit, so that the group is governed by the unit's choice of a bargaining representative, is similar to the determination of a particular unit's appropriateness for purposes of bargaining (see, *e.g.*, *National Labor Relations Board* v. *Sunset House*, 415 F. 2d 545, 547 (C.A. 9)), a determination which "involves of necessity a large measure of informed discretion, and the decision of the Board if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491.

The Company argues that the Board improperly determined in a unit clarification proceeding that a new job classification of Systems and Procedures Analyst

was part of the existing bargaining unit represented by the Union. The Company's argument rests upon the subsidiary contentions: 1) that the Analysts are not an accretion to the existing unit; 2) that the Analysts are professional employees as defined in the Act, and specifically excluded in the unit description; and 3) that in the circumstances of this case the Analysts could be added to the unit only through a representation election and not through the unit clarification procedure. None of these contentions raises an issue warranting further review.

1. In granting the Union's petition for clarification of the bargaining unit the Board determined that, after the Union's recertification in a Board election in 1956 as representative for the Company's approximately 280 office, clerical, and technical employees at the Jersey City plant, the Company installed computerized procedures and created the position of Analyst to perform work previously performed by unit employees. The Board thus concluded that the Analysts, seven in number, are technical employees whose community of interest lies in the existing unit and that they are a part thereof. Whether that conclusion, which was sustained by the court below, constitutes a reasonable exercise of the Board's discretion principally involves an assessment of particular facts, and thus does not warrant further review.[9] In any event, the facts summarized above (pp. 4–6) show that

[9] "An 'accretion' is, by definition, merely the addition of new employees to an already existing group. When the new employees are added to and comingled (sic) with existing employees so as to lose their separate identity, their inclusion in an existing

there is a rational basis for the Board's determination, and that the court below correctly sustained it.

2. The question (Pet. 23–26) whether the record supports the Board's finding that the Analysts are not professional employees as defined in the Act, and therefore are not specifically excluded from the unit, is insubstantial and does not warrant further review. The resolution of this issue of employee status nat-

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[bargaining] unit follows as a matter of course. * * * When such inclusion is permitted, on the basis of criteria developed by the Board and approved by the courts * * *, the new group is an 'accretion' to the old group." *National Labor Relations Board* v. *Food Employers Council, Inc.*, 399 F. 2d 501, 502–503 (C.A. 9); see also, *Borg-Warner Corp.*, 113 NLRB 152, affirmed *sub nom. International Union, etc.* v. *National Labor Relations Board*, 231 F. 2d 237, 243 (C.A. 7), certiorari denied, 352 U.S. 908.

The Board cases relied on by the Company (Pet. 15–17) rejecting a union's accretion claim are factualy distinguishable, because, unlike the instant case, they rested on a finding that the contested employees did not have a sufficient community of interest with employees in the existing unit, or on a finding that the union was seeking to add job classifications which existed when the union was certified or came into existence but were ignored by the union over a substantial period and during current contract negotiations. Here, there is no merit to the Company's claim that the position of Analyst existed before the Union's 1956 recertification in the form of the "staff assistant" (*supra*, pp. 1, 8–9). The latter, as the court below noted (Pet. 12a, 14a–15a), performed a higher-level staff function of conducting the study leading to the adoption of the mechanization process. Moreover, the Company's dilatory and unresponsive reply to the Union's 1965 attempts to obtain information to verify the Company's assertion that Analysts were professional employees excluded from the existing unit refutes the claim that, by entering into the 1966 contract omitting this new group, the Union had waived its representation rights as to them (Pet. 18a–19a).

urally turns upon the particular facts of each case (see, *e.g.*, *National Labor Relations Board v. Difco Laboratories, Inc.*, 389 F. 2d 663 (C.A. 6), certiorari denied, 393 U.S. 828), and "problems of definition of status * * * are precisely 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole.'" *Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko*, 373 U.S. 701, 706. See also, *National Labor Relations Board* v. *United Insurance Company, et al.*, 390 U.S. 254. In any event, for the reasons given by the court below (Pet. App. 14a–16a), substantial evidence supports the Board's finding that these individuals were not professionals.

3. The Company also claims that in the circumstances of this case the Analysts could be added to the existing unit only after voting for inclusion in a Board representation election and that the Board abused its discretion in employing the unit clarification procedure (Pet. 13–23).[7] The Union's motion to clarify

[7] In his concurring opinion, Judge Moore emphasized that he "wholly subscribe[d] to the Court's opinion [on this issue]" on the facts here presented" (Pet. App. 21a). His caveat concerning the future construction of the provision of the Act defining the term "professional employee" (Section 2(12)) "[a]s educational patterns change" thus does not detract from the support in the record for the Board's finding on this point.

Though arguing that the Union's clarification petition raised a statutory "question of representation" resolvable only in a Board election (Pet. 19–20), the Company also asserts that the Union did not meet the requisites for raising such a question (Pet. 15, n. 7). Under the Board's analysis, however, on facts

rested on the factual assertion, sustained by the Board and the court below, that the job classification of Analyst was established to perform a job function created after the Union's recertification in 1956, that the employees placed in this classification were technical employees sharing a community of interest with the existing unit, and, hence, that the Analysts are an accretion to that unit. As the court below held (Pet. App. 17a): "The Board's authority to define the appropriate bargaining unit is sufficiently broad to enable it to include new employees in an existing unit without holding an election when the requisite community of interests is present, and inclusion would result in a more efficient collective bargaining relationship. *Carey* v. *Westinghouse Electric Corporation*, 375 U.S. 261, 268–269 (1964)."[10]

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such as presented here the matter for resolution may properly be viewed as the current scope of an existing bargaining unit, and the Board's procedures provide for unit clarification only in the absence of a question concerning representation (*infra*, p. 18). As the court below noted, no question of representation existed here and whether the presence of such a question would preclude the clarification procedure is not in issue (Pet. App. 16a, n. 2).

[10] The Board cases cited by the Company (Pet. 20–21) merely demonstrate that the Board will not grant a unit clarification petition and will require an election when, unlike the instant case, the union seeks to expand the unit to include employees in job categories existing but unclaimed throughout the union's certification and the parties' bargaining history.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board.

SEPTEMBER 1971.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 State. 136, 73 State. 519, 29 U.S.C. 151, *et seq.*) in addition to those set forth in the petition, are as follows:

> SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.
>
> * * * * *
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *

The relevant provisions of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, in addition to those set forth in the petition, are as follows:

> **Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act**

SEC. 102.60 [29 C.F.R. 102.60] *Petitions.*

* * * * *

(b) *Petition for clarification of bargaining unit or petition for amendment of certification under section 9(b) of the Act; who may file; where to file; withdrawal.*—A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

SEC. 102.61 [29 C.F.R. 102.61] *Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.*

* * * * *

(d) A petition for clarification shall contain the following:

(1) The name of the employer and the name of the recognized or certified bargaining representative.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) A description of the present bargaining unit and, if the bargaining unit is certified, an identification of the existing certification.

(5) A description of the proposed clarification.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of unit.

(10) The name, the affiliation, if any, and the address of the petitibner.

(11) Any other relevent facts.

* * * * *

STATEMENTS OF PROCEDURE

* * * * *

Subpart C—Representation Cases Under Section 9(c) of the Act and Petitions for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

SEC. 101.17 [29 C.F.R. 101.17] *Initiation of representation cases and petitions for clarification and amendment.*

The investigation of the question as to whether a union represents a majority of an appropriate grouping of employees is initiated by the filing of a petition by any person or labor organization acting on behalf of a substantial number of employees or by an employer when one or more individuals or labor organizations present to him a claim to be recognized as the exclusive bargaining representative. If there is a certified or currently recognized representative, any employee, or group of employees, or any individual or labor organization acting in their behalf may also file decertification proceedings to test the question of whether the certified or recognized

agent is still the representative of the employees. If there is a certified or currently recognized representative of a bargaining unit and there is no question concerning representation, a party may file a petition for clarification of the bargaining unit. If there is a unit covered by a certification and there is no question concerning representation, any party may file a petition for amendment to reflect changed circumstances, such as changes in the name or affiliation of the labor organization involved or in the name or location of the employer involved. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. It is filed with the regional director for the region in which the proposed or actual bargaining unit exists. Petition forms, which are supplied by the regional office upon request, provide, among other things, for a description of the contemplated or existing appropriate bargaining unit, the approximate number of employees involved, and the names of all labor organizations which claim to represent the employees. If a petition is filed by a labor organization seeking certification, or in the case of a petition to decertify a certified or recognized bargaining agent, the petitioner must supply, within 48 hours after filing but in no event later than the last day on which the petition might timely be filed, evidence of representation. Such evidence is usually in the form of cards, which must be dated, authorizing the labor organization to represent the employees or authorizing the petitioner to file a decertification proceeding. If a petition is filed by an employer, the petitioner must supply, within 48 hours after filing, proof of demand for recognition by the labor or-

ganization named in the petition and, in the event the labor organization named is the incumbent representative of the unit involved, a statement of the objective considerations demonstrating reasonable grounds for believing that the labor organization has lost its majority status.

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